

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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STEPHEN ELLIOT,	:	18-CV-5680 (LDH)
Plaintiff,	:	
	:	
-against-	:	United States Courthouse
	:	Brooklyn, New York
	:	
MOIRA DONEGAN AND JANE (1-30)	:	Friday, March 1, 2019
DOES,	:	2:00 p.m.
	:	
Defendant.	:	
	:	

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TRANSCRIPT OF CIVIL CAUSE FOR PREMOTION CONFERENCE
BEFORE THE HONORABLE LASHANN DEARCY HALL
UNITED STATES DISTRICT COURT JUDGE

A P P E A R A N C E S:

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1 THE COURTROOM DEPUTY: Civil cause for premotion
2 conference, 18-CV-5680, Elliot v. Donegan, et al.

3 Counsel, please state your name for the record.

4 MR. LEWIS: Nicholas Lewis of Nesenoff & Miltenberg
5 363 Seventh Avenue --

6 THE COURT: Give me a moment.

7 I'm sorry, go ahead.

8 MR. LEWIS: Good afternoon, your Honor. Nicholas
9 Lewis for Plaintiff, Stephen Elliot.

10 Good afternoon, counsel.

11 MS. KAPLAN: Good afternoon, your Honor. Roberta
12 Kaplan, Kaplan Hecker & Fink, for Defendant Moira Donegan.
13 I'm here with my colleagues, Jonathan Matz and Martha
14 Fitzgerald. And my client is sitting in the courtroom as
15 well, your Honor.

16 THE COURT: Good afternoon to you all. You may be
17 seated.

18 Okay, folks, we are here in connection with
19 Defendant's impending motion to dismiss this case, where the
20 Plaintiff brings claims for defamation, intentional infliction
21 of emotional distress, as well as negligent infliction of
22 emotional distress. I want to start off with what potentially
23 could be negating issue, which is Defendant's argument
24 concerning *Communications Decency Act*.

25 I'll hear from the Defendant.

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1 MS. KAPLAN: Your Honor, we believe that one of the
2 grounds that we will state in our motion to dismiss is
3 immunity under the CDA, that the form that was set up, the
4 Google document that was set up in this case, as alleged by
5 Plaintiff and further described in the article by Ms. Donegan,
6 which is cited by Plaintiff in their complaint and which is
7 thereby incorporated for reference, describes what she did in
8 doing this is essentially setting up precisely the kind of
9 electronic communication that was entitled to CDA immunity
10 under the statute.

11 If the Court wants to avoid the constitutional First
12 Amendment issues that are associated with the defamation
13 claims, one easy way, we think, to resolve this case is under
14 CDA immunity.

15 THE COURT: Putting aside what facts could
16 potentially come out in discovery, if I'm to take the
17 complaint as it is alleged, don't Paragraphs 19 and 20 allege
18 that, indeed, Ms. Donegan authored some of the statements on
19 the list?

20 In particular, at Paragraph 19, Defendants -- and
21 "Defendants" in this instance is defined in the claim as
22 including Ms. Donegan and the Jane Doe defendants -- that they
23 published certain statements; in particular, rape accusations,
24 sexual harassment.

25 And that was under the column heading "alleged

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1 misconduct."

2 And that, further, the column was amended to read:
3 Rape accusation, sexual harassment, coercion, unsolicited
4 invitations to his apartment, a dude who snuck into Binders.

5 MS. KAPLAN: Your Honor, a fundamental problem with
6 the complaint that's related to this but is an independent,
7 which is improper group pleading under Rule 8.

8 Specifically, what the complaint does not say in
9 Paragraphs 19 or 20, as well as Paragraphs, your Honor, 4, 41,
10 and 42, is that Ms. Donegan, as opposed to any of these other
11 unnamed Jane Does, did this particular act. And, in fact, I
12 think if you press Plaintiff, they will say they do not know
13 who put on the statements about Mr. Elliot.

14 And under Rule 8, which requires you to state what
15 you believe each individual defendant did, even more important
16 in the context of defamation, obviously, given the malice and
17 the mens rea requirements, the complaint fails under that to
18 begin with. So, certainly, they cannot save the claim of
19 defamation for that.

20 But for CDA purposes, what's crucial is that she
21 created this anonymous document that allowed people on the
22 internet to say these things. That's exactly what Congress
23 intended the CDA to protect.

24 THE COURT: And I'll agree with you if, indeed, the
25 only allegation in the complaint is that she created the list,

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1 created the headers, even the development of the coding system
2 as alleged without authorship, that, indeed, the CDA would
3 likely provide immunity to Ms. Donegan.

4 The concern that I have is making the determination
5 that you argue that the allegations here run afoul of Rule 8
6 in terms of group pleading. I'm not willing to go that far on
7 this complaint as it's alleged.

8 So, you know, again, the Court can't make a
9 determination at this point as to how and which discovery
10 would unfold. But it seems to me for purposes of a motion to
11 dismiss and accepting the allegations as true, as I must, in
12 light of what is alleged in Paragraph 19 and 20 of the
13 complaint, that at this juncture the CDA doesn't act as a
14 shield.

15 So, let's put that aside for now and let's move on
16 to the negligent infliction of emotional distress.

17 Mr. Lewis, am I mistaken that you've effectively
18 conceded this claim?

19 I didn't see it, but certainly it could be the case
20 that it was written in fine print. But I don't recall seeing
21 an argument in response to the negligent infliction of
22 emotional distress arguments. And, again, I could be
23 mistaken.

24 MR. LEWIS: No, your Honor, we did not oppose.

25 THE COURT: And that's because you recognize there

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1 is no duty pleaded here.

2 MR. LEWIS: Yes, your Honor.

3 THE COURT: All right. So, my expectation is that
4 the Plaintiff is voluntarily withdrawing that claim.

5 MR. LEWIS: Yes, your Honor.

6 THE COURT: Let's move on to the intentional
7 infliction of emotional distress claim. I'll hear from the
8 Defendants.

9 MS. KAPLAN: With respect to intentional infliction
10 of emotional distress, your Honor, the standard under the New
11 York common law, as I'm sure your Honor is aware, is extreme
12 and outrageous conduct, and particularly in New York,
13 particularly in cases where it's speech, because New York law
14 and New York common law and New York State constitutional Law
15 is so protective of free speech rights in this state.

16 The case law is very clear that when they say
17 extreme and outrageous, it needs to be extreme and outrageous.
18 When you look at the factual scenarios in which this claim has
19 been held to lie is really kind of ridden one end of the
20 spectrum.

21 Here's where that group pleading problem comes in
22 again. There is no allegation here that Ms. Donegan, as
23 opposed to any of the other unnamed Jane Does, put out any of
24 the statements with respect to Mr. Elliot. So, on that basis
25 alone, there's no basis to conclude that even if those

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1 statements were sufficiently outrageous, which we believe
2 there are not, there's certainly nothing to allege that she
3 did anything with respect to intentional infliction of
4 emotional distress. And they also haven't alleged, similar to
5 the defamation, the intention on her part to the create the
6 emotional distress; again, also relevant for the malice
7 required for defamation.

8 THE COURT: Mr. Lewis, I wanted you to, if you
9 could, focus your arguments with regard to the requisite level
10 of extreme and outrageous conduct. I think you have a problem
11 here, quite frankly.

12 MR. LEWIS: Your Honor, respectfully, our argument
13 is that the soliciting of unsubstantiated rape allegations and
14 encouraging anonymous posting without any proof or further
15 evidence that these defamatory allegations are being posted
16 constitutes outrageous conduct and that the acts were
17 intentional by Ms. Donegan.

18 THE COURT: I have a question for you: In your
19 estimation, would statements, say, that a nurse was
20 euthanizing her patients and reporting those statements to a
21 hospital as well as the district attorney, would you say that
22 those sorts of statements, that someone was making an
23 intentional misrepresentation that a nurse was effectively
24 killing her patients and reporting that both to the hospital
25 and the district attorney, would you think that that would

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1 fall into the category of extreme and outrageous conduct?

2 MR. LEWIS: If it was a statement that was made
3 without any regard to whether those statements were true or
4 with knowledge they were false, I would.

5 THE COURT: You would say that would fall into the
6 category of extreme and outrageous conduct?

7 MR. LEWIS: I would agree with that.

8 THE COURT: You see, at least the Appellate Division
9 disagrees with you on that. And I wanted to look for some
10 cases that I thought might include conduct that looked like
11 the conduct that we had here, that at least one might say is
12 equal to degree and I would say that that conduct is equal to
13 degree. The Appellate Division doesn't believe that that
14 conduct is sufficiently extreme and outrageous.

15 Will you pass this case to Mr. Lewis, please, and
16 you can pass a copy to defense counsel?

17 I don't think that you can get there.

18 Now, the other question I want to ask you is with
19 respect to IIED claims generally and the purpose of those
20 claims, isn't it the case that when an IIED claim falls within
21 the ambit of an existing tort claim, it shouldn't lie, and
22 here this existing tort claim would be the defamation claim
23 that you lodge?

24 MR. LEWIS: If I may also, I think it's in response
25 to this as well, your Honor, it's not just the statement alone

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1 but the active soliciting of statements were also included in
2 the acts of Ms. Donegan; not just that the statements were
3 made, but that the purpose of list was created to solicit a
4 number of claims unsubstantiated.

5 That was just -- I just wanted to make that clear if
6 I hadn't already, your Honor. Thank you.

7 THE COURT: And I hear you. I don't think that gets
8 you over the hurdle.

9 Putting that aside, again, isn't it the case that
10 the fact that you have here a defamation claim, which, at
11 least as I can see, would capture the conduct that you are
12 seeking to redress for with respect to your IIED claim, makes
13 it such that the IIED claim is ripe for dismissal?

14 MR. LEWIS: Well, of course, your Honor, with the --
15 I would also note that if discovery were to reveal, as we
16 hoped it would, with a subpoena to unmask the Jane Does, if
17 there were definitive proof that some of the Defendants were
18 not involved in the actual defamatory statement but in the act
19 of --

20 THE COURT: Right now we're talking about a motion
21 for Ms. Donegan.

22 MR. LEWIS: I understand.

23 THE COURT: And right now, what you have is a
24 defamation claim that you're pressing against Ms. Donegan.

25 MR. LEWIS: Yes, your Honor.

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1 THE COURT: I'm reading from another Appellate
2 Division case, the first department: Plaintiff's cause of
3 action for intentional infliction of emotional distress must
4 also fail because it falls within the ambit of other
5 traditional tort liability, which in this case is reflected in
6 plaintiff's cause of action sounding in defamation.

7 Doesn't that in and of itself provide a basis for
8 this Court to dismiss the IIED claim in favor of the
9 defamation claim?

10 MR. LEWIS: I suppose it does, your Honor, yes.

11 MS. KAPLAN: Your Honor, not only do I agree, but
12 the Levin case, written by Judge Kaplan -- no relation -- of
13 the Southern District stands for exactly that proposition as
14 well.

15 MR. LEWIS: I suppose it does, your Honor.

16 THE COURT: Does that supposition mean that you
17 intend to withdraw that claim as well?

18 MR. LEWIS: I will pull the case, but if that would
19 be helpful...

20 THE COURT: I'll help you out. Pass this to
21 Mr. Lewis.

22 I wanted to kind of go in this order so that we can
23 could now then get to the heart of it, which would be the
24 defamation claim. It doesn't seem to me based on the
25 allegations in this complaint that the parties are disputing

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1 that the Plaintiff in this case is a public figure. I think
2 that, as I read the Defendant's letter, you argue that you've
3 met the standard necessary to proceed with the defamation
4 claim applying the standard as it would be against a public
5 figure.

6 So, I just want to make sure we're all operating on
7 the same sheet of music.

8 MR. LEWIS: Yes, your Honor, we believe that it's --
9 the actual malice is certainly met here.

10 THE COURT: Let's put that aside.

11 Ms. Kaplan, I know that you and I certainly view the
12 allegations in Paragraph 19 and 20 differently with respect to
13 whether they allege that Ms. Donegan engaged in the actual
14 publication, but let's proceed under my view of the world.

15 MS. KAPLAN: Understood, your Honor.

16 THE COURT: So, let's talk about malice.

17 MS. KAPLAN: So, your Honor, as written in an
18 extremely comprehensive decision by Judge Oetken in the *Biro*
19 case that was then subsequently affirmed by the Second
20 Circuit, it's very clear today that allegations of malice in
21 this context in the wake of *Iqbal* and *Twombly* require the same
22 kind of plausibility allegations that you would see in any
23 other context that I'm sure your Honor is familiar with every
24 day.

25 Here, critically, all that's alleged with respect to

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1 malice is, first of all, a whole bunch of boilerplate, which
2 obviously doesn't apply; she acted with malice, she acted
3 recklessly, we all know that under *Iqbal*, *Twombly* and *Biro*
4 that's not good enough; two, that she hated men; and, three --

5 And, again, this is even assuming Ms. Donegan did
6 this. But you understand my position: That's not
7 sufficiently pled, but assuming she did it.

8 -- and, three, and I'm a bit of a prude here so I'll
9 try to say without embarrassing myself, but that Ms. Donegan
10 was somehow aware of certain predilections on the part of
11 Mr. Elliot's behavior that she should somehow know he was not
12 possible of raping women, I guess.

13 So, let me address those one after the other. As I
14 said before, the boilerplate is not good enough, I think we
15 can all agree.

16 Hatred of men. Here's where you kind of I think
17 have to incorporate and look to the state that we're in, which
18 is New York, as your Honor knows, which has probably the
19 strongest common law defamation standard and state
20 constitutional defamation standard in the country and which
21 takes these things very seriously. And alleging generally
22 that someone hates men is insufficient to state a case for
23 malice.

24 And I would cite on that Judge Kaye's very, very
25 well-developed opinion in the *Lieberman* case, cited in our

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1 papers, where she talks about disliking someone or not liking
2 someone not even being close to the standard for malice.

3 And that only leaves you then, your Honor, with this
4 statement about Mr. Elliot's sexual behavior. Again, your
5 Honor, I don't think there's anything there sufficient to
6 state a case for malice, particularly under Judge Kaye's
7 analysis in *Lieberman*.

8 On top of that, as I mentioned, your Honor, I think
9 the Court is perfectly entitled to read Ms. Donegan's own
10 statements in the article that's cited, that she wrote, by the
11 Plaintiff in the complaint in which she explains why she did
12 what she did, she explains the context, she explains how the
13 list was created. And everything she says in that article not
14 only is inconsistent with any claim of malice but actually
15 rebuts any claim of malice.

16 So, I think under these allegations as pled,
17 essentially, as boilerplate, under *Biro*, under *Iqbal*, under
18 *Twombly*, and the New York cases like *Lieberman*, there's just
19 not enough here to go forward with the complaint.

20 THE COURT: Mr. Lewis?

21 MR. LEWIS: Your Honor, respectfully, with regard to
22 the Defendant's article, the statements regarding "I hate men"
23 and "I'm enjoying the witch-hunt" are relevant for her, I
24 guess -- belie the claims in the article that this was done --

25 THE COURT: Let's assume she hates men. Just for

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1 the record, let's assume she hates them. I don't see how you
2 can go from her generalized hatred of men to a reasonable
3 inference of malice with regard to your client, which is what
4 you'd have to establish.

5 MR. LEWIS: Your Honor, I believe the more important
6 part of the quote is "I'm enjoying the witch-hunt" as
7 indicative that there's witch-hunt claims that are -- claims
8 that are indicative that she knows the claims, I guess
9 including claims against my client, are false.

10 THE COURT: "Enjoying the witch-hunt" means that she
11 knows that they are false?

12 I don't see the logical connection there.

13 MR. LEWIS: I believe the term "witch-hunt"
14 indicates --

15 THE COURT: What if there's an actual witch? There
16 are lots of people who go around saying that folks are engaged
17 in witch-hunts, and we can all have our own beliefs as to
18 whether or not witches exist.

19 MR. LEWIS: Of course.

20 The point is Mr. Elliot brought this matter because
21 he is -- also regarding the too timid to rape defense, there's
22 no defense here: Mr. Elliot is saying he's not a rapist, this
23 is a false statement, and the publishing of these statements
24 were done with a reckless disregard for whether they are true
25 or not.

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1 THE COURT: I appreciate that. The question is
2 whether the allegations in the complaint are sufficient to
3 make the claim. I understand why he is pursuing the claim.
4 It's abundantly clear to me.

5 But what is not clear to me or what we're here to
6 discuss is whether the allegations are sufficient to proceed.
7 Again, I think you have a malice problem as the defense has
8 identified.

9 MR. LEWIS: Your Honor, I would note that there's
10 the Second Circuit case law, *Church of Scientology* --

11 THE COURT: Yes.

12 MR. LEWIS: -- that refers to: Actual malice may be
13 shown where the defamatory statements are based wholly on an
14 unverified anonymous source.

15 THE COURT: I did see that, and you cited that case
16 in your submission. And, so, I looked at that case closely
17 and then I looked at that case against the pleadings.

18 If we go to the complaint, particularly at Paragraph
19 17 as well as at Paragraph 1, but let's all go to Paragraph
20 17, because the case says, listen, if you publish information
21 from anonymous sources, that potentially could be a basis to
22 discern that there might be malice.

23 But what was pleaded here was that the site allowed
24 loud women to anonymously publish. The way this is pleaded it
25 reads as -- I don't know of any other way to interpret it --

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1 is that it gave an opportunity for women to provide this
2 information so that the public would not know who the women
3 were. It was anonymous to the public.

4 The next sentence, you state that: Upon information
5 and belief, the Defendants created and circulated it to
6 numerous women in the media industry via e-mail and electronic
7 means.

8 The reasonable inference drawn is that it was
9 circulated to someone who they knew.

10 And then you said, It was not password-protected.
11 The caveat was that it couldn't be forwarded to men.

12 So, it was circulated to someone that they knew.
13 Certainly they knew it wasn't a man, according to you. But
14 the anonymous aspect of the pleadings is not about the source
15 being anonymous to the Defendants but being anonymous to the
16 people who received the information.

17 That is not the concern that's raised in *Church of*
18 *Scientology*.

19 MR. LEWIS: Your Honor, if I may, the sentence in
20 stating that the list was created for the stated purpose of
21 encouraging women to anonymously publish allegations, so that
22 the people who are publishing the defamatory statements are
23 posting anonymously.

24 THE COURT: Posting anonymously so that the
25 receivers of the information, the public, doesn't know who the

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1 information is from.

2 Read the *Church of Scientology* case. The concern
3 there was that someone was proceeding recklessly because their
4 own sources were unknown to them, so they weren't reliable to
5 them.

6 That's not what you pleaded.

7 MR. LEWIS: I respectfully disagree, your Honor, in
8 that in saying that -- and this is also from Ms. Donegan's
9 article, I believe -- the purpose of the list was that the
10 people posting were posting anonymously so that they are
11 soliciting -- I don't believe where --

12 THE COURT: This may be curable. I'm not suggesting
13 that you can't cure the pleading.

14 MR. LEWIS: Okay.

15 THE COURT: But what I'm telling you, what you wrote
16 is not what the *Church of Scientology* case stands for. It
17 just isn't.

18 MS. KAPLAN: One thing I would add, your Honor,
19 because I'm a civil procedure geek, IS the *Church of*
20 *Scientology* case was decided before *Iqbal* and *Twombly* in the
21 Second Circuit and again in the *Biro* case has made it very
22 clear that those standards apply. So, it's not even clear
23 whether that complaint would have survived today given the new
24 plausibility standard that applies here.

25 THE COURT: Let's put aside the argument concerning

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1 the anonymous publication. There were additional arguments
2 that were made by the Defendants.

3 MR. LEWIS: Yes, your Honor.

4 THE COURT: Particularly concerning your client's
5 sexual preferences. Again, I don't believe that it is a
6 reasonable inference to be drawn that even if Ms. Donegan or
7 the Jane Does knew of his sexual preferences, that that would
8 mean that it would be a reason for them to cast doubt on the
9 veracity of an allegation concerning sexual misconduct.

10 It could equally be argued that someone could say
11 that if you have these sexual preferences, that you might be
12 someone who would be likely to engage. There's just no
13 necessary logical conclusion to the existence of his sexual
14 preferences with respect to his likelihood to engage in sexual
15 misconduct.

16 MR. LEWIS: The other -- I agree, your Honor. This
17 is not the only thing we are saying.

18 THE COURT: Right.

19 MR. LEWIS: It's just one of --

20 THE COURT: But I don't think it's one that the
21 Court would use, right, this is not a situation where we can
22 add that to a pile. It doesn't get added to a pile because I
23 don't think that there's a logical connection.

24 MR. LEWIS: I think also, your Honor, just I believe
25 that the fact that this is a small community where,

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1 presumably, at least some of the people posting statements
2 know the Defendant personally. It was more about their
3 knowledge --

4 THE COURT: With respect to Ms. Donegan, the
5 allegation in the complaint as it's pleaded with respect to
6 his sexual preferences is that that should have put her on
7 notice. I don't find that to be a reasonable inference to be
8 drawn.

9 MR. LEWIS: Okay.

10 THE COURT: So, that leaves us with what?

11 I think a problem with respect to malice here.

12 The generalized animus towards men. It's
13 interesting because the Defendants cited the *Church of*
14 *Scientology*, and I'm not certain if you were aware the *Church*
15 *of Scientology* deals with that issue as well.

16 In that case, the Second Circuit states that: CSI
17 argues that Behar had a negative view of Scientology and that
18 his bias pervaded his investigation and caused him to publish
19 false and defamatory statements about CSI. The District Court
20 found that the evidence could not support such a claim. The
21 Second Circuit agreed.

22 So, the Second Circuit in the very case that you
23 cite to the Court rejected the argument that you made that
24 this generalized bias towards a community was sufficient to
25 establish the requisite malice towards an individual necessary

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1 to plead a claim for defamation.

2 I'm not deciding this case today -- this is a
3 premotion conference -- but I also don't like to play hide the
4 ball and I don't like to waste folks' time. If this were
5 briefed, you're going to come up short. And we can skip ahead
6 and you can certainly take an opportunity without you all
7 needing to brief it and the Court needing to then draft an
8 opinion, and we've already dealt with the intentional
9 infliction and negligent infliction of emotional distress
10 claims, you could undertake --

11 Somebody's phone is ringing and it's driving me a
12 little bit insane.

13 In any event, you can decide at this juncture, Let
14 me undertake to amendment the complaint. The Court has made
15 the clear where she thinks the deficiencies lie.

16 I'm not going to bully you into doing that.

17 MR. LEWIS: Of course, that will be something -- I
18 don't know, I'm not necessarily high enough on the totem pole
19 to make that decision by myself right here, but I will
20 certainly discuss with both my client and --

21 THE COURT: You should tell your client and the
22 folks higher up on the totem pole that the Court believes that
23 proceeding to briefing, given the deficiencies that I've
24 identified --

25 You're not going to be able to, I'm going to tell

1 you, change my interpretation of the allegations. I don't
2 think there's any dispute here as to the applicable law. The
3 question is how is it that the Court is interpreting the
4 allegations and whether or not they meet the requirements as
5 set out under the law. I don't with respect to malice. You
6 should let them know that so we can all move on.

7 And perhaps you can cure the deficiencies and then
8 we have an opportunity to decide whether this goes forward in
9 another direction, but that's where we really are today.

10 What's today, Friday, folks?

11 So talk to the folks higher up on the totem pole,
12 get a copy of this transcript and make sure your client sees
13 it, and advise the Court by next Friday whether you intend to
14 amend the complaint in an effort to cure the deficiencies. If
15 you do not intend to amend the complaint to cure the
16 deficiencies, the Defendants will have two weeks to submit
17 their motion to dismiss.

18 MS. KAPLAN: Thank you, your Honor.

19 THE COURT: However, based on the conversation
20 today, I believe that the only claims that are surviving or
21 the only claim that's surviving is the defamation claim.

22 Am I correct, Mr. Lewis?

23 MR. LEWIS: Yes.

24 If I might just ask your Honor, in citing the *Arista*
25 *Records* case with regard to the Defendant actively encouraging

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1 and enticing others to contribute --

2 THE COURT: What claim are we talking about?

3 MR. LEWIS: With regard to defamation.

4 THE COURT: Okay. And you want to refer me to which
5 case?

6 MR. LEWIS: The *Arista Records LLC v. Doe*. I, of
7 course, recognize it is a copyright infringement case, but the
8 test from *Arista Records* is, of course, also used for
9 defamation matters in the discovery context.

10 THE COURT: If you want to talk about your
11 allegations with regard to encouraging because you believe
12 that that somehow establishes it, when I looked -- and I did
13 look because that was an argument that you made for purposes
14 of the CDA aspect as well -- I don't read the allegations the
15 way in which you are urging me to.

16 What you've said, They created a list of
17 publicly-accessible shared Google spreadsheet for the purposes
18 of encouraging women to anonymously publish allegations.

19 That doesn't suggest an encouragement of people to
20 engage in wrongdoing. Simply making something open isn't the
21 same sort of encouragement, say, for example in the
22 *roommates.com* case, where they were encouraging them to engage
23 in discriminatory conduct. This is simply opening up a
24 platform. I don't see it in the same way that I think you'd
25 like the Court to view that. I don't think it changes my

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1 analysis here.

2 Next Friday is March 8. You'll advise the Court in
3 writing by March 8 if you intend to amend the complaint; if
4 you don't, the defense will have two weeks to file their
5 motion to dismiss; you'll have one month from that date to
6 file your opposition.

7 What's that?

8 THE LAW CLERK: March 22 for the motion to dismiss.

9 THE COURT: And the opposition, one month later?

10 THE LAW CLERK: Would be April 26.

11 THE COURT: And then two weeks for a reply?

12 THE LAW CLERK: May 3.

13 THE COURT: Do you guys have those dates? because I
14 don't.

15 MR. LEWIS: I just didn't have the April.

16 Was it April 23?

17 THE LAW CLERK: April 26.

18 MR. LEWIS: April 26. Thank you.

19 THE COURT: Opposition, April 26; reply, May 10.

20 If you intend to amend, you have two weeks from
21 March 8 to do so.

22 Which is, again, what date?

23 THE LAW CLERK: Two weeks from the 8th? That is the
24 22th.

25 THE COURT: You'll have March 22 to file an amended

Proceedings

24

1 complaint.

2 MS. KAPLAN: One more thing, your Honor.

3 On the discovery issue -- because you know there's
4 request for a Google subpoena -- if it at all would help on
5 that, we would agree to have an even shorter schedule. We
6 could follow one week if we could get some agreement from the
7 other side that in the interim, until the issues get resolved,
8 we won't have to proceed with the proceeding in the Northern
9 District of California --

10 THE COURT: This is the deal: I need to know what
11 you're going to do with the complaint. If there's no
12 operative complaint, we're not going to proceed to discovery.
13 So, let's figure out what you're going to do with this
14 complaint.

15 I will caution the Defendants that the likelihood
16 that I won't allow some limited discovery for the purpose of
17 determining who the Jane Does are is unlikely.

18 But we're not proceeding right now. I think we've
19 got some things we need to sort out. I won't even know until
20 come Friday we have a complaint. So, why don't we figure that
21 out first and then we will proceed once we have either an
22 amended complaint or we're clear we're going into briefing.

23 But, again, folks should expect that the Plaintiff
24 is going to be able to have some limited discovery. I'm not
25 making any determinations on the scope of that discovery. It

1 very well may be the case that as currently crafted it's
2 overly broad and you may want to consider that. I suspect
3 that there may be if discovery proceeds a motion to quash at
4 least on the ground of scope. But all of that is a bridge
5 that we'll cross when we get to it.

6 MS. KAPLAN: Thank you, your Honor.

7 THE COURT: Is there anything else that we need to
8 attend to.

9 MR. LEWIS: No, I don't believe so, your Honor.

10 THE COURT: Thank you. I appreciate it.

11

12 (Matter concluded.)

13

14

15 *I certify that the foregoing is a correct transcript from*
16 *the record of proceedings in the above-entitled matter.*

16

17 /s/ Linda A. Marino
LINDA A. MARINO

March 1, 2019
Date

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